Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

October Term 2001

JUSTIN R. DAHLZ,	)	No.
	)	
Petitioner,	)	
	)	
	)	
vs.	)	
	)	
COUNTY OF SAN MATEO, et al.	)	
	)	
Respondents.	)	

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ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JUSTIN R. DAHLZ
Petitioner Pro Se
1486 Huntington Ave. Ste.304
South San Francisco, CA 94080
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QUESTIONS PRESENTED FOR REVIEW

WHETHER THE DISTRICT COURT ERRED IN GRANTING RESPONDENTS' MOTION TO DISMISS PETITIONER'S FIRST AMENDED COMPLAINT FOR FAILURE TO STATE A CLAIM PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 12 (b) (6)?

LIST OF PARTIES TO THE PROCEEDINGS

The parties to the proceeding is Petitioner Justin R. Dahlz ("Petitioner") and Respondents County of San Mateo, County of San Mateo Sheriffs Department, Don Horsley, in his official capacity as Sheriff of County of San Mateo and ex-officio Marshal of the Municipal Court, Detectives 1 and 2, sued individually and in their official capacity as detective sheriffs for the County of San Mateo, W.L. Hudson & Sons, Inc., a California Corporation and Clifford V. Cretan.

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OPINIONS BELOW

The Order by the United States District Court Granting Defendants' Motion to Dismiss the complaint in Justin R. Dahlz v. County of San Mateo, et al. (N.D. Cal.) was entered on August 24, 1999 and is unreported (the "District Court Order") (App. B). The Memorandum Decision of the United States Court of Appeals for the Ninth Circuit affirming the District Court Order was enterd on March 2, 2001 (the "Ninth Circuit Decision") (App. A).

JURISDICTION

The judgment of the Court of Appeals was entered on March 2, 2001. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Sec. 1254 (1).

STATUTES AND CONSTITITUONAL PROVISIONS INVOLVED

The pertinent provisions of 42 U.S.C. Sec 1983 and the Fourth and Fourteenth Amendments of the United States Constitution is set forth below:

Section 1 of the Klu Klux Klan Act of 1871, Rev. Stat. 1979, as amended, 42 U.S.C. Sec. 1983 provides:

> "Any person who, under color of any law, statute, ordinance, regulation,custom, or usage of any state, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proceeding for redress."

The Fourth Amendment to the United States

Constitution states:

> "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or Affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fourteenth Amendment to the United States Constitution, Section 1 states in pertinent part:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

A. FACTS

Petitioner Justin R. Dahlz ("Petitioner" or "Dahlz") petitions for review the entry of the order dismissing the action with prejudice in favor of all the named Respondents, County of San Mateo, County of San Mateo Sheriffs Department, Leonard E. Cardoza, in his official capacity as Sheriff of the County of San Mateo and ex-officio Marshal of the Municipal Court, Detectives 1 and 2, sued individually and in their official capacity as detective sheriffs for the County of San Mateo (the "County Respondents", "County Detective Respondents")[1], W.L.

[1] "CR" denotes the District Court Clerk's record number; "ER" is the Excerpts of Record number where appropriate as was used before the Ninth Circuit Court of Appeals.

Hudson & Sons, Inc., a California Corporation and Clifford V. Cretan (the "Individual Respondents", "Hudson" or "Cretan").

This case arises under the Civil Rights Act, 42 U.S.C. Sec. 1983. The district court's order does not fully detail the facts as alleged by petitioner in his First Amended Complaint ("FAC") and in fact what is detailed is not completely accurate as to the allegations set forth in the FAC. Specifying the allegations as set forth in the FAC is critical to understanding the nature and scope of the constitutional violations alleged and therefore they are set forth more fully below.

Petitioner is a practicing attorney in the County of San Mateo. Cretan is also a practicing attorney in the County. The petitioner was a personal defendant in a lawsuit filed against him and his client in the Municipal Court of the County of San Mateo by Hudson. Hudson was represented by Cretan and obtained a default judgement against the petitioner and thereafter ordered a debtor's examination of him. (CR:19; ER: 13, 11. 10-18)

When petitioner did not appear at the debtor's order of examination, the court issued a bench warrant for his arrest without issuing an order to show cause hearing re: contempt. Petitioner was arrested pursuant to the warrant and subsequently released on bail. (CR: 19; ER: 13, 11. 19-23).

Petitioner will not making reference to the Reporter's Transcript since there is none.

Cretan on behalf of Hudson and at the direction of the court prepared the bench warrant signed by the court for petitioner's arrest. (CR: 19, 24; ER: 14, 11. 15-16, 24-25).[2]

There is no affidavit by Cretan supporting a finding of probable cause for issuance of the warrant. (CR: 24; ER: 24-25).

The court then ordered a new appearance for petitioner, petitioner did appear at the time and date set for the hearing in the department that he was ordered to appear in but approximately one (1) hour after he arrived, the clerk in the department told him to go downstairs to the clerk's office. (CR: 19, ER: 3, 11. 23-28).

At the clerk's office the petitioner was informed that the hearing was to take place in another department, he then went to that department and was informed by the clerk that a new bench warrant for his arrest was being issued. (CR: 19, ER: 14, 11. 1-13). The petitioner tried to infrom the clerk why he was late for the hearing but the bailiff prevented him from doing so. (CR: 19, ER: 11. 8-10).[3]

Once again, Cretan on behalf of Hudson and at the

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[2]The actual bench warrants were attached to the County's Request for Judicial Notice filed on May 5, 1999. (CR: 24; ER: 24-28).

[3]The district court's order states that petitioner failed to appear on the new hearing date and that a new bench warrant was issued and that he was arrested. (CR: 38; ER: 32, 11. 2-5). This is incorrect because as set forth in the FAC and above, petitioner alleges that he did appear in the department that the cour originally ordered him to appear in on the new hearing date.

direction of the court prepared the bench warrant signed by the court for petitioner's arrest without issuing an order to show cause hearing re: contempt. (CR: 19, 24; ER: 14, 11. 15-16. 27-28).

And once again, there is no affidavit by Cretan supporting a finding of probable cause for issuance of the warrant. (CR: 24; ER: 27-28).

From September 29, 1997 thru October 17, 1997, petitioner attempted to contact Cretan to obtain information about the warrant and to resolve the matter and have the warrant recalled. Cretan never returned petioner's numerous phone calls to him during this period of time and so petitioner next checked the court file and discovered that the warrant had not yet been filed and so he asked the clerk of the court's civil division to call Cretan. (CR: 19, ER: 14, 11, 14-25).

The new bench warrant as prepared by Cretan and signed by the court was then filed on November 4. 1997. (CR: 24; ER: 27). The warrant set bail in the amount of $10,000.00 and instructed that if bail was posted, appellant was ordered to appear at 9:00 a.m. the second Monday. Wednesday or Friday following the arrest. (CR: 24, ER: 27).

However, on Friday, October 17, 1997 at approximately 5:00 p.m., the County detective respondents came to petitioner's law office and arrested him. At the time of the arrest, petitioner explained to the detectives what

had transpired and offered to post bail but was refused. Petitioner was then imprisoned and placed in solitary confinement from October 17, 1997 to October 20, 1997. (CR: 19; ER: 14, 11. 26-28, 15, 11, 1-9).

On Tuesday, October 21, 1997, after spending four (4) days in solitary confinement, petitioner appeared in court in prison attire and Cretan on behalf of Hudson conducted his debtor's examination. (CR: 19; ER: 15, 11. 10-13).

Petiitioner filed the instant action on October 19, 1998 in the United States District for the Northern District of California, alleging that the respondents violated his federal civil rights pursuant to 42 U.S.C. Sec. 1983 and for false arrest and imprisonment under state law. (CR: 1; ER: 1-9).

The county respondents, county detective respondents, Hudson and Cretan replied by filing respective motions to dismiss for failure to state a claim pursuant to Federal Rule of Civil Procedure 12 (b) (6). (CR: 9-12, 13-14)

Petitioner responded by filing a FAC prior to a hearing on the matter pursuant to Federal Rule of Civil Procedure15(a). (CR:19; ER:10-20)

All of the respondents then filed respective motions to desmiss the FAC for failure to state a claim pursuant to Federal Rule of Civil Procedure 12 (b) (6) (the "Motion"). (CR: 27-28).

Petitioner filed a written opposition to respondents' respective motions and after supplemental briefing on the matter, the district court took the matter under submission, and on August 24, 1999 issued an order granting the respective motions to dismiss with prejudice. (App. B).

Respondent filed a timely Notice of Appeal from the district court's order on September 23, 1999 to the United States Court of Appeal for the Ninth Circuit and the Ninth Circuit issued a Memorandum Decision affirming the District Court Order was entered on March 2, 2001 (App. A).

REASONS FOR GRANTING THE WRIT

A. THE DISTRICT COURT ERRED IN GRANTING RESPONDENTS' RESPECTIVE MOTIONS TO DISMISS PETITIONER'S FIRST CLAIM FOR RELIEF UNDER 42 U.S.C. Sec. 1983

1. Petitioner's first claim for relief properly alleges or can allege sufficient facts under a cognizable legal theory.

(a) Hudson and Cretan acted under "color of law" for purpose of 42 U.S.C. Sec. 1983.

Since Hudson and Cretan are private individuals, the threshold issue is whether they acted under "color of law" for purposes of 42 U.S.C. Sec. 1983.

The "color of law" requirement for purposes of Sec. 1983 is treated the same as the "state action" requirement under the Fourteenth Amendment. Lugar v. Edmonson Oil Co.

Inc., 457 U.S. 922, 929, 102 S. Ct. 2744, 2749, 73 L. Ed. 2d 482 (1982). Actions taken by private individuals may be found to be under "color of law" where there is significant state involvement. Lugar, 457 U.S. at 941, 102 S.Ct. at 2756; Howerton v. Gabica, 708 F. 2d 380, 382-383 (1983).

While the Court has developed multiple tests to find equivalent state action[4], one such test is met where " [p] rivavate persons, jointly engaged with state officials, in the prohibited action, are acting under color of law for purposes of 42 U.S.C. Sec. 1983 . . . It is enough that (the private party) is a willful participant in joint activity with the State or its agents." Howerton, 708 F.2d at 383.

In the case at bar, the FAC alleges and the judicially noticed exhibits indicate that the warrants were prepared by Cretan on behalf of Hudson at the direction of the court, which should clearly make them willful participants with the court and its agents. (CR: 19, 24; ER: 14, 11. 15-16, 24-28).

An independent test for finding that a private individual acted under "color of law" for purposes of Sec. 1983 is when the private individual acts "in the exercise [of powers]. . . exclusively reserved to the State." Jackson v. Metropolitan Edison Co., 419 U.S. 345, 352 (1974) (" [I]f we

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[4] The Court has articulated four distinct approaches to the state action question; (1) the "public function" test, (2) the "state compulsion" test, (3) the "nexus" test and (4) a "joint action" test. Lugar, 457 U.S. at 941, 102 S. Ct. at 2754-55.

were dealing with the exercise by Metropolitan of some power delegate to it by the State which is traditionally associated with sovereignty, such as eminent domain, our case would be a different one.").

The preparation and issuancee of a bench warrant is a power exclusively reserved to the State. The FAC also alleges that Cretan was delegated the right to prepare the warrants by the court, thus the "color of law" requirement can be met under the Court's "public function" test.[5][6]

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[5]The Court has repeatdly held that "when private individuals or groups are endowed by the State with powers or functions governmental in nature, they become agencies or instrumentalities of the State and subject to its constitutional limitations." Evans v. Newton, 382 U.S. 296, 299, 86 S.Ct. 486, 15 L.Ed. 2d 373 (1966); Terry v. Adams, 345 U.S. 461, 73 S.Ct. 809, 97 L.Ed. 1152 (1953) (private political association and its elections constitute state action); Marsh v. Alabama, 326 U.S. 501, 66 S.Ct. 276, 90 L.Ed. 265 (1946) (privately owned "company town" is a state actor).

[6]Prior to the Court's decision in Edmonson v. Leesville Concrete Co., 500 U.S. 614, 111 S.Ct. 2077, 114 L.Ed.2d 660 (1991), the public funciton test required that the fuction conducted by a private party must have been a "traditionally exclusive government fuction." See Rendell-Baker v. Kohn, 457 U.S. 830, 102 S.Ct. 2764, 73 L.Ed.2d 418 (1982). In Edmonson however, the Court held that private parties become state actors when they exercise peremptory challenges. As noted by the Edmonson dissent, the public function test, prior to this case, required that the private actor exercise a power "traditionally exclusively reserved to the State." Id., 500 U.S. at 632. The dissent also noted that it has never been exclusively the function of the government to never been exclusively the function of the government to select juries - that peremptory strikes are older than the Republic, and that the prior requisite of "exclusivity" element was lacking. Thus, it appears that the notion of "exclusivity" may no longer be a true prerequisite to a finding of government function, or at least has been called into question.

The "color of law" requirement is also independently met because Hudson and Cretan made extensive use of state procedures with the "overt, significant assistance of state officials." Tulsa Professional Collection Services v. Pope, 485 U.S. 478, 487, 102 S.Ct. 1340, 1345, 99 L.Ed. 2d 565 (1988).

In Lugar, the Court formulated a general analytical framework for determining whether private individuals are acting under "color of law" under Sec. 1983. The Court asked first whether the claimed constitutional deprivation resulted from the exercise of a right or privilege having its source in state authority, 457 U.S. at 939-41, and second, whether the private party charged with the deprivation could be described in all fairness as a state actor, id., 457 U.S. at 941-42.

There would appear to be no question that the first part of the Lugar test is satisfied here. By its very nature, the issuance of a bench a warrant has no significance outside of a court of law. The warrant can only be issued and executed, as in the case at bar, by a court, in accordance with statutory or decisional case law. The second part of the Lugar test is met because Hudson and Cretan made extensive use of state procedures in having the warrants issued in order to have the appellant arrested with the "overt, significant assistance of state officials", in this instance the court and its agents.

After Cretan prepared the warrants, the court signed it and the court's agents executed it. The court and its agents were intimately involved throughout the process and without that involvement the appellant would never have been arrested. See Tulsa Professional, 485 U.S. at 487, 102 S.Ct. at 1346 ("[H]ere in contrast, there is significant state action. The probate court is intimately involved throughout, and without that involvement the time bar is never activated."). As the Court found in Tulsa Professional, "[t]his involvement [by the court] is so pervasive and substantial that it must be considered state action subject to the restrictions of the Fourteenth Amendment." Id., 485 U.S. at 487, 102 S.C. at 1346; see also Edmonson (the use of peremptory challengees by private litigants in civil cases was found to constitute "state action" subject to constitutional non discrimination requirements).

If the "color of law" requirement has been satisfied, then the next part of the inquiry must focus on the nature of the constitutional violations claimed to have been violated.

(b) The FAC sufficiently alleges or can allege cognizable claims against Hudson and Cretan for purposes of 42 U.S.C. Sec. 1983.

The statutory framework that governs this case is to be found at California Code of Civil Procedure Sec. 1209

dealing with civil contempt. California Code of Civil Procedure Sec. 1209 (a) (5) makes disobedience of any lawful judgment, order, or process of the court a contempt of the authority of the court. A "direct" contempt is that committed in the immediate view and presence of the court of the judge in chambers; all other contempts, which occur outside the presence of the court, are "indirect". See Nierenberg v. Superior Court, 59 Cal.App.3d 611, 616 (1976).

California Code of Civil Procedure Sec. 1209 (a) (5) makes a contempt punishable by a fine not exceeding $1,000.00 or by imprionment not exceeding five days, or both.

In the case at bar, both the FAC and the judicially noticed warrants indicate that the warrants were issued because appellant allegedly failed to appear at the court ordered debtor's examination on March 10, 1997 and September 29, 1997, thus if petitioner was in contempt of court, the contempt is "indirect". (CR: 19; ER: 13, 11. 17-28, 14, 11. 1-17; 24-28).

Because of the potential punishment, this type of proceeding is considered quasi-criminal, and an accused is entitled to constitutional guarantees of due process, including notice of the charges. Warner v. Superior Court, 126 Cal.App.2d 821 (1954); In re Hess, 45 Cal.2d 171, 175 (1955), followed by People v. Anderson, 15 Cal.3d 806, 809 (1975) ("[d]ue process of law requires that an accused be advised of the charges against him in order that he may have

a reasonable opportunity to prepare and present his defense and not be taken by surprise by evidence offered at his trial.")

Because the alleged contempt by petitioner was not made in the court's presence, the constitutional due process guarantee of notice and opportunity to be heard as codified in California Code of Civil Procedure Sec. 1211 (a) governs, and required that instead of immediately issuing a bench warrant for petitioner's arrest, a hearing on an order to show cause re: contempt should have been set based on an affidavit presented to the court of the facts constituting the contempt. This procedure was not followed and instead petitioner was arrested without the benefit of a hearing on the matter.

The affidavit requirement is a jurisdictional prerequisite to a court's power to punish an indirect contempt. Moss v. Superior Court, 158 Cal.App.3d 604 (1984); Anderson v. Superior Court, 68 Cal.App.4th 1240 (1998) (" '[t]he facts essential to jurisdiction for a contempt proceeding are (1) the making of the order; (2) knowledge of the order; (3) ability of the respondent to render compliance; (4) willful disobedience of the order.") (citations omitted).

Notwithstanding this, California Code of Civil Procedure Sec. 1209 (c) stays the execution of an order of contempt for three (3) judicial days pending the filing of a

petition for extraordinary relief testing the lawfulness of the court's order when the order is made affecting an attorney, as is the case here. Instead, not only was petitioner never afforded a hearing as to whether he was in contempt of court regarding either arrest, but to compound his difficulties, he was not afforded a stay of the contempt orders as he was entitled to by law since he was an attorney.

For purposes of the procedural component of the Due Process Clause, petitioner's claim is analyzed in two parts: (1) deprivation of a interest protected under the clause, and (2) denial of adequate procedural protections. Goldberg v. Kelly, 397 U.S. 254 (1970).

The Ninth Circuit following this Court's case law has previously held that a state statute can create a liberty interest protected by the due process clause, see Carlo v. City of Chino, 105 F.3d 493, 496-500 (9th Cir. 1997), and the adequate procedural protections were codified by statute at California Code of Civil Procedure Sec. 1209 and Sec. 1211. A liberty interest protected under the Due Process Clause is implicated since civil contempt proceedings are quasi-criminal in nature because of the penalties involved.

Independent of the state procedural safeguards, the Constitution requires that petitioner be afforded notice and opportunity to be heard at a meaningful time and in a meaningful manner prior to the deprivation of his liberty. United States v. James Daniel Good Real Property, 510 U.S.

43, 48 (1993).

Petitoner has alleged that there was no substantive justification to hold him in contempt of court because the first time that he failed to appear at the debtor's examination was inadvertent and that he in fact did appear as ordered at the second examination hearing[7], (CR: 19, ER: 13, 11. 17-28, 14, 1-13). Assuming for the present that these allegations are not taken as true for purposes of a 12(b) (6) motion, procedural due process is indifferent to the substance and ultimate outcome of the order to show cause hearing since "[t]he right to procedural due process is 'absolute', and 'the law recognizes the importance to organized society that those rights be scrupulously observed." Clements v. Airport Authority of Washoe County, 69 F.3d 321, 333 (9th Cir. 1995) (quoting Carey v. Piphus 435 U.S. 247, 266-67 (1978)).

Equal Protection Clause analysis does not depend on whether petitioner has a protectible liberty interest but looks to whether he was denied equal protecion of law, which is essentially a direction that all persons similarly situated should be treated alike. City of Cleburne, Tex. v. Cleburne Living Center, 473 U.S. 432, 439 (1985). In this case, that amounts to the allegations that have been plead, that in effect, the court's statutory contempt power was

[7]Civil contempt is a proper sanction only if the misconduct is "willful". See Runnion v. Workers' Comp. Appeals Bd., 59 Cal.App.4th 277 (1997).

applied against him arbitrarily. Armanderiz v. Penman, 75 F.3d 1311, 1327 (9th Cir. 1996) (en banc); Lockary v. Kayfetz, 917 F.2d 1150, 1155-56 (9th Cir. 1990).

Turning to the substantive component of the Due Process Clause, the rule of analysis adopted by this circuit in Armanderiz is that:

> "[W}here a particular amendment provides an explicit textual source of constitutional protection against a particular sort of government behaviour, that amendment, not the more generalized notion of substantive due process must be the guide for analyzing [a party's] claims." Id., 75 F.3d at 1320 (citations omitted).[8]

Therefore, petitioner's substantive claim under the Due Process Clause is not analyzed under a generalized notion of substantive due process but as alleged in the FAC under the Fourth Amendment's guarantee to be free from unreasonable searches or seizures. (CR: 19; ER: 16, 11. 9-11).

In this case, the FAC raises a question as to the reasonableness of the issuance of the warrants in question and the subsequent arrests of petitioner, since

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[8]This rule of analysis is consistent with long established Court precedent that "[c]ertain wrongs can affect more than a single right and, accordingly, can implicate more than one of the Constitution's commands." Soldal v. Cook County, 506 U.S. 56, 69 (1992). The proper question then is not which amendment controls but whether either amendment is violated.

there is no affidavit that was ever prepared or filed by Cretan justifying the warants. See Gerstein v. Pugh, 420 U.S. 103, 117, 95 S.Ct. S.Ct. 854, 864-865, 43 L.Ed. 2d 54 (1975) (the Fourth Amendment requires that arrest warrants be based upon probable cause, supported by oath or affirmation, a requirement that may be satisfied by an indictment returned by a grand jury, but not by the mere filing of criminal charges in an unsworn information signed by the prosecutor); United States v. Cannon, 29 F.3d 472, 478 (9th Cir. 1994) (warrant is valid if issuing judge had substantial basis to conclude affidavit establishes probable cause).

As argued above, California Code of Civile Procedure Sec. 1211(a) also required that instead of immediately issuing a bench warrant for petitioner's arrest, a hearing on an order to show cause re: contempt should have been set based on an affidavit present to the court of the facts constituting the contempt. If an affidavit had been filed and an order to show cause hearing had been set and if petitioner had failed to appear at the hearing, then the court could have then issued a warrant for his arrest based on the affidavit.

Although a state law violation is not actionable in a Sec. 1983 claim, federal courts must necessarily consider the lawfulness of an arrest under state law. See Pierce v. Multnomah County, Or., 76 F.3d 1032, 1038 (9th Cir. 1994) (state law determines reasonableness of arrest in a Sec. 1983

claim), cert. denied, ___U.S.___, 117 S. Ct. 506, 136 L.Ed. 2d 397 (1996); United States v. Mota, 982 F.2d 1384, 1387 (9th Cir. 1993) (reasonableness of arrest determined by referring to state law in a criminal case); United States v. Wanless, 882 F.2d 1459, 1464 (9th cir. 1989) (federal law may require searches and seizures be conducted in accordance with state law). Also, "a violation of state...law can serve as the basis of a section 1983 action '[w]here the violation of state law causes the deprivation of rights protected by the Constitution.'" Draper v. Coombs, 792 F.2d 915, 921 (9th Cir. 1986) (quoting Wirth v. Surles, 562 F.2d 319, 322 (4th Cir. 1977).

Therefore, looking to the law as codified in California Code of Civil Procedure Sec. 1209 and 1211 and well established court precedent, petitioner has alleged sufficient facts as to the objective reasonableness of the issuance of the warrants and his subsequent arrests.

Independent of this, the Fourth Amendement explicitly requires that a warrant be issued by a "neutral and detached magistrate," who must actually determine whether probable cause for an arrest exists. United States v. Device, Labeled Theramtic, 641 F.2d 1289, 1293 (1981) ("[t]hese requirements are not mere formalities. '[T]he very purpose of the warrant requirement...is to place a neutral magistrate between the public and police conduct.' [citations]. That is why the Court has insisted that the

official who issues a warrant must be capable of determining whether probable cause exists for the requested arrest or search.") (citation omitted).

In the case at bar, the petitioner has sufficiently alleged that the court had no probable cause to arrest him since there is no affidavit establishing the requisite elements of probable cause for contempt.

Finally, having Cretan prepare the warrants violated long standing and recognized precedent that it is fundamentally unfair to allow a prosecutor or party to an action to be involved in any way in the adjudicative process; especially a quasi-criminal proceeding of this type. See Schweiker v. McClure, 456 U.S. 188, 195, 102 S.Ct. 1665, 1669, 72 L.Ed.2d 1 (1982) ("[a]s this court has repeatedly recognized, due process demands impartiality on the part of those who function in judicial or quasi-judicial capacities.")

(c) Hudson and Cretan as "private" defendants are not entitled to immunity under 42 U.S.C. Sec. 1983.

In Wyatt v. Cole, 504 U.S., 158, 112 S.Ct. 1827, 118 L.Ed.2d (1992), the Court considered whether private defendants, charged with Sec. 1983 liability for "invoking state replevin, garnishment, and attachment statutes" later declared unconstitutional were "entitled to qualified immunity from suit." Id. at 159. It held that they were not.

Id. at 169.

In Richardson v. McKnight, 521 U.S. 399, 117 S.Ct. 2100, 138 L.Ed.2d 540 (1997), the Court denied immunity from suit under Sec. 1983 to prison guards who were employees of a private person management firm considering the history and purpose of the immunity doctrine.

While it is true that in Richardson, the Court "answered the immunity question narrowly, in the context in which it arose," Richardson, 521 U.S. at 413, 117 S.Ct. 2100, petitioner does not know of any case in the Ninth Circuit or other circuits where immunity has been accorded to private defendants under Sec. 1983, and binding circuit precedent both before and after Wyatt and Richardson were decided suggests otherwise. See Howerton, 708 F.2d at 385 n.10 ("there is no good faith immunity under section 1983 for private parties who act under color of state law to deprive an individual of his or her constitutional rights"); F.E. Trotter, Inc. v. Watkins, 869 F.2d 1312, 1318-19 (9th Cir. 1989); Halvorsen v. Baird, 146 F.3d 680, 686 (9th Cir. 1989); Bibeau v. Pacific Northwest Research Foundation, 188 F.3d 1105, 1111-12 (9th Cir. 1998).

Thus, Hudson and Cretan bear the burden of establishing why the immunity doctrine should apply to them and if so, the type of immunity to be accorded them.

If Hudson and Cretan are accorded immunity, they should not be accorded quasi-judicial immunity, because even

if the preparation and issuance of a warrant is related to the exercise of a judicial function, a function that quasi-judicial immunity seeks to protect as "'the function of resolving disputes between parties, or of authoritatively adjudicating private rights'", Antoine v. Byers & Anderson, 508 U.S. 429, 435-436 (1993) (quoting Burns v. Reed, 500 U.S. 478, 500, 111 S.Ct. 1934, 114 L.Ed.2d 547 (1991)), judicial immunity does apply to this case where the preparation and issuance of the warrant was made without an affidavit and hearing, which as argued above, under California statutory and decisional case law and federal procedural due process principles are actions taken in "the clear absence of all jurisdiction" and not accorded judicial immunity. See Stump v. Sparkman, 435 U.S. 349, 356-57, 98 S.Ct. 1099, 1105, 55 L.Ed.2d 331 (1978) (quoting Bradley v. Fisher, 13 Wall (80 U.S.) 335, 351, 20 L.Ed. 646 (1872)); Mireles v. Waco, 502 U.S. 9, 11-12, 112 S.Ct. 286, 288, 116 L.Ed.2d 9 (1991).

The rule is well settled in California that a void order cannot be the basis for a valid contempt judgment and may be collaterally attacked at any time. See People v. Gonzalez, 12 Cal.4th 804, 815-818 (1996).

Aside from the fact that the warrants are void because of the lack of a contempt hearing, the Ninth Circuit has also held that a judge's or quasi-judicial officer's participation in a case as a counsel renders the proceeding so infected with invalidity as to render any order under review

as a result of the proceedings void. See American Gen. Ins. Co. V. Federal Trade Com'n, 589 F.2d 462 (9th Cir. 1979) (cited with approval in Walker v. City of Berkely, 951 F. 2d 182 (9th Cir. 1991)).

American Gen. explains that logic and history have long rquired that a party should not be a judge in his own case, citing as precedent "venerable tradition in Anglo-American legal history" that can be found in such commentaries as Blackstone and Coke. Id., at 463-464.

As American Gen. explained:

> "That the judge's or quasi-judicial officer's participation in the case may have been superficial rather than substantial does not affect the applicability of the principle." Id., at 464. (emphasis added).

American Gen. applied an automatic disqualification rule and concluded that the Federal Trade Commission's final order under review was "infected with invalidity by reason of Commissioner Collier's participation." Id., at 465. Similarly, Hudson and Cretan's participation in the adjudicative process taints the proceedings in such a manner as to render the warrants void.

Moreover, the parties in this case are the litigant and its counsel who independently set the hearing on the debtor's examination, and absolute immunity at common

law did not extend to complaining witnesses who "set the wheels of government in motion by instigating a legal action." Wyatt, 504 U.S. a 164-165, 112 S.Ct. at 1831; Malley v. Briggs, 475 U.S. 335, 340-341, 106 S.Ct. 1092, 1095-96, 89 L.Ed.2d 71 (1986) ("We do not find a comparable [common-law] tradition of absolute immunity for one whose complaint causes a warrant to issue").

If petitioner is correct that quasi-judicial immunity does not apply, then Hudson and Cretan would enjoy qualified immunity unless their conduct violates "clearly established constitutional rights of which reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982). The qualified immunity analysis requires a two-part inquiry: (1) Was the law governing Hudson and Cretan's conduct clearly established? (2) Under the law could they reasonably have believed their conduct lawful? Act Up!/Portland v. Bagley, 988 F.2d 868, 871-872 (9th Cir. 1993). "A public official is not entitled to qualified immunity when the contours of the allegedly violated right were sufficiently clear that a reasonable official would understand that what he [was] doing violated[d] that right." Osolinski v. Kane, 92 F.3d 934, 936 (9th Cir. 1996) (alterations in the original) (internal quotations omitted).

The law in this case was clearly established by both statute and state and federal decisional case law which

defined the constitutional rights in question. Even if a court orders a litigant to prepare a warrant and ultimately signs and issues it, Hudson and Cretan were not free to simply ignore the clear mandate of the law which divested the court of jurisdiction without a hearing based on an affidavit. The facts as alleged by petitioner cannot support a reasonable belief that the conduct of Hudson and Cretan was lawful, entitling them to qualified immunity. Act Up!, 988 F.2d at 873.

(d) The FAC sufficiently alleges or can allege cognizable claims against the County detective respondents for purposes of 42 U.S.C. Sec. 1983.

The FAC alleges that when the County detective respondents arrested him he explained to them his attempts to reach Cretan to resolve the matter, and then offered to post bail and was refused, placed in solitary confinement for over three (3) days and brought to court the Tuesday after his arrest. (CR: 19; ER: 15, 11.4-13).

The face of the warrant instructs that bail was to be set in the sum of $10,000.00 and then states that if petitioner posts bail he is permitted to appear in court the second Monday, Wednesday or Friday following the date of his arrest. (CR: 24; ER: 27).

Bail was mandatory as California Code of Civil Procedure Sec. 1213 requires that "[w]henever a warrant or

attachment is issued pursuant to this title the court or judge must direct, by an endorsement on * * * the warrant, that the person charged may * * * give an undertaking for the person's appearance in an amount to be specified in such endorsement."

Notwithstanding that the County detective respondents ignored the clear mandate of the warrant and statute by refusing bail, they then held him incommunicado in solitary confinement for more than three (3) days. This was clearly a violation of petitioner's due process rights. Strandberg v. City of Helena, 791 F.2d 744, 747 (9th Cir. 1986) (right to communicate "subject to rational limitations in the face of legitimate security interests of the penal institution"); Henry v. County of Shasta, 132 F.3d 512, 519 (9th Cir. 1997) (holding a prisoner incommunicado in violation of state law violates his Fifth Amendment due process rights); Carlo, 105 F.3d at 496-500.

(e) The County detective respondents are not entitled to quasi-judicial immunity.

The district court enunciated the proposition that "it is established that a police officer executing a court order is entitled to abolute, quasi-judicial immunity from section 1983 suits for enforcing the order. (App. B) (citing Henry v. Farmer City State Bank, 808 F.2d 1228, 1238 (7th Cir. 1986) and Coverdell v. Department of Social and Health Services, 834 F.2d 758, 768 (9th Cir. 1987)). (CR: 38;

ER: 32).

But Coverdell clarifies that the application of quasi-judicial immunity is contingent on the person "faithfully execut[ing] [a] valid court order." Id., 834 F.2d at 764. (alterations in the original) (citing other circuits for the same authority).

The County respondent detectives can hardly be said to have "faithfully" executed the warrant when the face of the warrant entitled appellant to be released on bail.

An official acting outside the scope of his authority does not enjoy absolute immunity for his actions. Mays v. Sudderth, 97 F.3d 107, 114 (5th Cir. 1996) (citing Turney v. O'Toole, 898 F.2d 1470, 1474 (10th Cir. 1990) and other circuits to the same effect). Since the FAC alleges facts establishing that the County detective respondents acted outside the scope of the authority of the warrant quasi-judicial immunity does not apply.

Moreover, "'[t]here are limits to how unlawful an order can be and still immunize the officer executing it.'" Mays, 97 F.3d at 114 (quoting Turney, 898 F.2d at 1474). "As the officer's immunity derives from that of the issuing judge, the order must be one from which the judge is absolutely immune from suit. Thus, we do not find that a state official would be absolutely immune from suit based on compliance with an order issued by a judge acting 'in the clear absence of all jurisdiction.'" Mays, 97 F.3d at 114.

Since the FAC alleges that the court issued the order in the complete absence of all jurisdiction by failing to first order to show cause hearing based on an affidavit establishing probable cause quasi-judicial immunity should not be granted the County detective respondents.

The warrant in question is also facially defective since there is no affidavit attached to it as required by California Code of Civil Procedure Sec. 1211(a).

The County detective respondents are also not entitled to qualified immunity since the conduct alleged "is so patently violative of the constitutional right that reasonable officials would know without guidance from the courts that the action was unconstitutional, closely analogous pre-existing case law is not required to show that the law is clearly established." Mendoza v. Block, 27 F.3d 1357, 1361 (9th Cir. 1994); see Backlund v. Barnhart, 778 F.2d 1386, 1390 (9th Cir. 1985) ("Certainly...[Sec. 1983 plaintiffs] need not always produce binding precedent... There may be cases of conduct so egregious that any reasonable person would have recognized a constitutional violation.").

This is a case of "conduct so egregious that any reasonable person would have recognized a constitutional violation"; the detectives can read the warrant, it establishes the right to bail and did not authorize them to arrest petititioner without bail and then place him in solitary

confinement. And it was unreasonable to first bring him before the court on Tuesday, October 21, 1997, holding him in confinement an extra day, when the court was open on Monday, October 20, 1997. (CR: 19; ER: 15, 11. 10-13).

(f) The FAC sufficiently alleges that the County detective respondents acted pursuant to official policy for purposes of holding the County liable under 42 U.S.C. Sec. 1983.

"In this circuit, a claim of municipal liability under section 1983 is sufficient to withstand a motion to dismiss even if the claim is based on nothing more than a bare allegation that the individual officers' conduct conformed to official policy, custom or practice." Karim-Panahi v. Los Angeles Police Department, 839 F.2d 621, 624 (9th Cir. 1988). This is consistent with notice pleading standards under Federal Rule Rule 8 and this Court's precedent which governs Sec. 1983 claims against governmental entities.

The district court cities two Court cases for the proposition that appellant must allege that the officers acted pursuant to a policy that caused a violation of his constitutional rights. (App. B) (CR: 38; ER: 6, 11. 23-26, 7, 11. 1-10) (citing Board of County Commissioners of Bryan County v. Brown, 520 U.S. 397, 404 (1997) and City of Oklahoma City v. Tuttie, 471 U.S. 808, 824 (1985) (Brennan,

J., concurring)).

First, the Court precedent is distinguishable since it does not deal with pleading standards for Sec. 1983 liability under a Monell[9] theory of liablility, but the standards required at the proof stage. The Court proof standard is not required to be plead to withstand a 12 (b) (6) motion.

Notwithstanding this, the FAC does plead that the actions taken by the County and the County detective appellees was causally linked to official policy, custom or practice that deprived the appellant of his constitutional rights. (CR: 19; ER: 16, 11. 19-25). Since the FAC does allege conduct by the officers that constitutes a violation of appellant's constitutional rights the causal nexus required to be plead between individual governmental conduct and official policy has been satisfied. Even the district court agrees that appellant need not specifically identify the policy pursuant to which the officers were acting. (CR: 38; ER: 38, 11. 1-3).

However, from the above discussion it should be obvious that one way the "official policy" issue is satisfied is by way of the actions taken by the County and County detective respondents in arresting petitioner pursuant to an unconstitutional warrant issued by an official policymaker,

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[9]Referring to Monell v. New York City Department of Social Services, 436 U.S. 658, 690-694 (1978).

the judge who signed and issued the warrant. And the FAC alleges that petitioner was brought to the judge's court in prison attire after his arrest and raises the issue whether the County and County detective respondents actions were ratified by an official policymaker. (CR: 19; ER; 15, 11. 10-13).

Petitioner has sufficiently alleged facts constituting a Monell claim

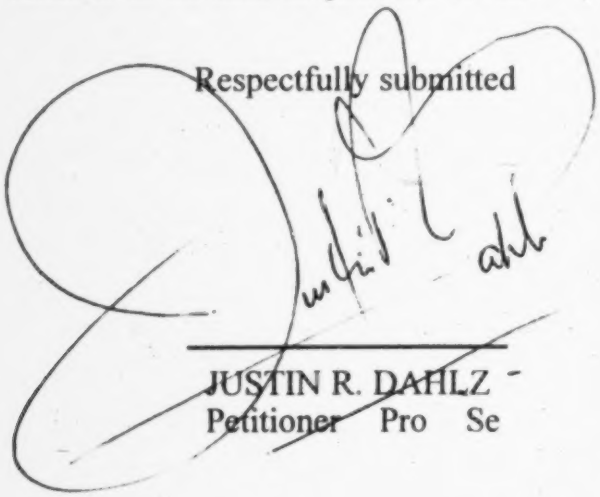
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CONCLUSION

For all the foregoing reasons, appellant respectfully requests a reversal of the Order and Ninth Circuit Decision with a remand to be able to proceed on his lawsuit.

Dated: May 31, 2001

Respectfully submitted



JUSTIN R. DAHLZ
Petitioner Pro Se

APPENDIX A

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JUSTIN R. DAHLZ,

Plaintiff-Appellant,

v,

COUNTY OF SAN MATEO;
SAN MATEO COUNTY
SHERIFF'S DEPARTMENT;
LEONARD E. CARDOZA,
Sheriff of County of San Mateo;
W.L.HUDSON & SONS, INC.,
a California corporation;
CLIFFORD V. CRETAN,

Defendants-Appellees.

No. 99-17109

D.C. No. CV-98-04020-VRW

MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
Vaughn R. Walker, District Judge, Presiding

Submitted February 14, 2001**
San Francisco, California
Before: ALARCON, KOZINSKI, and HAWKINS, Circuit Judges

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*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

**The panel finds this case appropriate for submission without oral argument pursuant to Fed R. App.P.34(a)(2).

California law allows a judge to issue a warrant for failure to appear for a debtor's examination,Cal.Civ.Proc.Code Sec 708.170,and Dahlz points to nothing that establishes that the warrant issued for his arrest was illegal.

Dahlz's section 1983 claims against creditor and his attorney fail because Dahlz cannot establish that they acted "under color of state law." The false arrestand imprisonment claims against the creditor and his attorney fail because a judge lawfully issued the bench warrant.

Dahlz's claims against the county and sheriff's department fail because he cannot establish that either hadf a "policy or custom" that violated his constitutional rights. Monell v. Dep't of Soc. Servs., 436 U>S>658,694(1978). Dahlz's detention does not violate constitutional standards of due process. See Baker v. McCollan 443 U.S.137, 145 (1979).

The arresting officers were executing a valid court order and are entitled to absolute immunity for their actions. Coverdell v. Dep't of Soc.& Health Servs. 834F.2d 758,764-65 (9th Cir. 1987).

The district court properly dismissed Dahlz's state claims, since Dahlz did not first present them to the appropriate state agency within six months of the accrual of the cause of action. Cal.Gov't Code Sec 911.2; Ridley v. City & County of San Francisco, 77 Cal.Rptr. 199, 202 (Cal. Ct. App. 1969). Moreover, California law provides immunity to any peace officer who makes an arrest pursuant to a warrant "regular upon its face" and without malice. Cal. Civ.Code Sec 43.55.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

JUSTIN DAHLZ, Plaintiff, v	)	No, C-98-4020 VRW
COUNTY OF SAN MATEO, DON HORSLY, COUNTY OF SAN MATEO SHERIFF'S DEPARTMENT, et al, Defendants	)	ORDER

2

Plaintiff Justin Dahlz alleges causes of action for false arrest and false imprisonment and for violation of his Fourth Amendment rights pursuant to 42 USC Sec 1983. Before the court is defendants County of San Mateo and Sheriff Don Horsly's motion to dismiss.

According to Dahlz's complaint, he was a defendant in a case entitled W.L.Hudson & Sons, Inc v Elaine Wessel, et al, before the Municipal Court of San Mateo County and a default judgment was entered against him. See First Amended Complaint ("FAC") para. 11. The court ordered a debtor's order of examination and when plaintiff did not appear, the judge issued a bench warrant for his arrest. See id para 12-14. Plaintiff was arrested pursuant to the warrant and subsequently released on bail. See id para 15. The court then ordered a new appearance for plaintiff, plaintiff once again failed to appear, a new bench warrant was issued and plaintiff was arrested again. See id para 16-25.

Plaintiff seeks to recover from the two sheriffs that arrested him for violation of his civil rights pursuant to section 1983. As to the detectives, the court first notes that they are not named in the complaint and there is no indication that plaintiff served them with the summons and complaint. In any event, it is established that a police officer executing a court order is entitled to absolute, quasi-judicial immunity from section 1983 suits for enforcing the order. See Henry v Farmer City State Bank, 808 F2d 1228, 1238 (7th Cir 1986), cited with approval in Coverdell v Department of Social and Health Services 834 F2d 758, 764 (9th Cir 1987) (holding that Child Protective Services employee was absolutely immune from

section 1983 liability for apprehending a child pursuant to a court order). During both of plaintiff's arrests, the unnamed detectives were acting pursuant to bench warrants signed and issued by Judge George A. Miram. See Defendants' Request for Judicial Notice, Exhs A-B,

Plaintiff argues that the officers are not entitled to quasi-judicial immunity under the "functional approach" taught by Antoine v Byers & Anderson , 508 US 429 (1993), and that to the extent Coverdell and Henry are inconsistent with Antoine ,they have been implicitly overruled. In determining whether quasi-judicial immunity applies to court reporters charged with producing verbatim transcripts of judicial proceedings, the Antoine court looked to whether court reporters had historically been accorded quasi-judicial immunity at common law. The court compared modern court court reporters to common-law judges who made handwritten notes during trials, and found that to the extent that the judges' actions involved an exercise of discretion, they were distinguishable from court reporters' actions, which are ministerial in nature. See id at 435-38. Plaintiff argues that because arresting officers did not have discretion to obey or disobey the warrant, they were performing a ministerial function and, pursuant to Antoine, cannot claim absolute quasi-judicial immunity.

Antoine defines the judicial function that quasi-judicial immunity seeks to protect as "the function of resolving disputes between parties, or of authoritatively adjudicating private rights." Id at 435-36, quoting Burns v Reed, 500 US 478, 500 (1991) (Scalia, J., concurring in judgment in part and dissenting in part).

Because court reporters do not perform this function by producing verbatim transcripts of judicial proceedings, the Antoine court concluded that "court reporters do not exercise the kind of judgment that is protected by the doctrine of judicial immunity." Id at 437. Left unstated in Antoine is that the ability of the courts to perform "the function of resolving disputes between parties, or of authoritatively adjudicating private rights," is not otherwise impaired by the threat of liability against court reporters for preparing erroneous transcripts. Coverdell and other cases make clear, by contrast, that the threat of liability against officials for the performance of ministerial functions pursuant to a court order would seriously impair the ability of courts to perform their judicial function. See, e.g., Coverdell , 834 F2d at 764 ("The fearless and unhesitating execution of court orders is essential if the court's authority and ability to function are to remain uncompromised."); Kermit Construction Corp v Banco Credito y Ahorro Ponceno , 547 F2d 1, 2 (1st Cir 1976) ("[A] fear of bringing down litigation on [a court-appointed receiver] might color a court's judgment in some cases; and if the court ignores the danger of harassing suits, tensions between receiver and judge seem inevitable.").

Antoine does not involve an official acting pursuant to a court order and therefore does not address the authorities indicating that to subject such officials to the threat of liability compromises the court's ability to carry out its discretionary function. The Seventh Circuit therefore concluded, rejecting an argument based on Antoine similar to plaintiff's argument in the instant case, that

Antoine "do[es] not support the proposition that judicial acts that are part of the judicial function are excluded from absolute immunity because they could be characterized as nondiscretionary or even ministerial." Wilson v Kelkhoff, 35 F3d 1438, 1444 (7th Cir 1996). Rather, Antoine "stands for the proposition that ministerial acts unrelated to the function the immunity is intended to protect are not covered by absolute immunity." Id. The plaintiff in Wilson argued that because the actions taken by Illinois prisoner review board officials who wrongfully revoked his mandatory supervised release were not discretionary, but were governed by law, the officials were engaged in a ministerial function and were not eligible for quasi-judicial immunity. The Wilson court concluded that regardless whether the prisoner review board officials' actions could be characterized as ministerial, they were protected by quasi-judicial immunity because their actions were related to the exercise of a judicial function -- determining whether the plaintiff was entitled to supervised release. See id.

Plaintiff does not provide any authority calling Coverdell, Henry or other analogous authority into question in light of Antoine. Given the rationale behind quasi-judicial immunity as expressed by Antoine, and the Seventh Circuit's interpretation of Antoine in Wilson, plaintiff's contention that Antoine casts doubt on Coverdell and Henry is meritless. Because the officers that arrested the plaintiff were acting pursuant to a court order, valid upon its face, they are entitled to quasi-judicial immunity for their actions in arresting plaintiff.

Even if the officers were not entitled to absolute, quasi-judicial immunity for their arrest of plaintiff, they would be entitled to qualified immunity. See Barlow v Ground , 943 F2d 1132, 1139 (9th Cir 1991) (police officers entitled to qualified immunity for seizure of blood pursuant to facially valid warrant subsequently invalidated by state court).

Plaintiff also seeks to recover from the County of San Mateo for the actions of its detectives. The County cannot be held liable pursuant to section 1983 on a respondeat theory. See Thompson v City of Los Angeles , 885 F2d 1439, 1443 (9th Cir 1989), citing Monell v New York City Department of Social Services , 436 US 658, 690-94 (1978). A municipality is liable under section 1983 when "action pursuant to official policy of some nature cause[s] a constitutional tort," Monell , 436 US at 691, or when the municipal body "has a policy of inaction and such inaction amounts to a failure to protect constitutional rights." Oviatt v Pearce , 954 F2d 1470, 1474 (9th Cir 1992), citing City of Canton v Harris ,489 US 378, 388 (1989).

Plaintiff contends that he has inadequately stated a claim for municipal liability pursuant to section 1983 based on his allegation that "in doing all of the things herein alleged, defendants, and each of them, acted under color of the authority of the statutes,regulations, customs and usages of the County of San Mateo ***." Compl para 29. Plaintiff cites Karim-Panahi v Los Angeles Police Department , 839 F2d 621, 624 (9th Cir 1988) , for the proposition that "[i]n this circuit, a claim of municipal liability under section 1983 is sufficient to withstand a motion to dismiss

even if the claim is based on not[h]ing more than a bare allegation that the individual officers' conduct conformed to official policy, custom or practice." Karim-Panahi quotes this language from Shah v County of Los Angeles , 797 F2d 743, 747 (9th Cir 1986) , which cites Guilory v County of Orange , 731 F2d 1379 (9th Cir 1984) , as support for the proposition.

As noted above, however, plaintiff must do more than indicate that the officers acted pursuant to a municipal policy, he must allege that they acted pursuant to a policy that caused a violation of his constitutional rights.

> [I]t is not enough for Sec 1983 plaintiff merely to identify conduct properly attributable to the municipality. The plaintiff must also demonstrate that,through its deliberate conduct, the municipality was the "moving force" behind the injury alleged. That is, a plaintiff must show that the municipal action was taken with the requisite degree of culpability and must demonstrate a direct causal link between the municipal action and the deprivation of federal rights.

Board of County Commissioners of Bryan County v Brown , 520US 397, 404 (1997). To hold otherwise, "would violate the evident congressional intent to preclude municipal liability in cases in which the city itself was at fault." City of Oklahoma City v Tuttle , 471 US 808, 824 (1985) (Brennan, J., concurring).

Because it was clear in Karim-Panahi , Shah and Guilory that the officers' conduct as alleged by the plaintiff constituted a violation of his constitutional rights, there was no question in any of these cases that a municipal policy encouraging such conduct would be culpable and have a direct causal link to a deprivation of federal rights. See Karim-Panahi , 839 F2d at 624 (plaintiff alleges that officers arrested him "unlawfully and with no reason, " after which they beat, assaulted and tortured him); Shah , 797 F2d at 743 (plaintiff alleges that prison deputies "assaulted and harassed him, denied him medical treatment, and opened his mail without his consent."); Guilory , 731 F2d 1379, 1382 (plaintiff alleges that police chiefs arbitrarily and capriciously denied his applications for a permit to carry a concealed weapon). In each of these cases, the proposition that "a claim of municipal liability under section 1983 is sufficient to withstand a motion to dismiss even if the claim is based on nothing more than a bare allegation that the individual officers' conduct conformed to official policy, custom or practice," was intended to make clear that plaintiff does not need specifically to identify the policy pursuant to which the officers were acting.

This does not imply that plaintiff may survive a motion to dismiss based on such a bare allegation where it is

apparent from plaintiff's own complaint that any policy pursuant to which the officers were acting could not have been the cause of a deprivation of plaintiff's federally protected rights. Plaintiff makes no real attempt to challenge the validity of the warrant. He asserts that the defendants "acted with a complete absence of jurisdiction," a conclusionary allegation that does not even address the warrant by its own terms. See FAC para 33. The officers' conduct in arresting plaintiff pursuant to a valid warrant was entirely lawful. See Cohen v Norris , 300 F2d 24, 31 (9th Cir 1962); Johnson v Miller , 680 F2d 39 (7th Cir 1982). The court has no doubt that in doing so, they were acting pursuant to a policy of the County of San Mateo. Such a policy, however, is entirely lawful. Indeed, it is the policy of the State of California that officers who fail to arrest a person pursuant to a valid warrant are subject to criminal liability. See Cal Penal Code Sec 142. Accordingly, plaintiff cannot allege that the County of San Mateo's policy was the cause of a deprivation of a federal right and his section 1983 claim against the county must therefore fail.

Next, the court turns to plaintiff's attempt to recover from the unnamed detectives for false arrest and false imprisonment.

> There shall be no liability on the part of, and no cause of action shall arise against, any peace officer who makes an arrest pursuant to a warrant of arrest regular upon its face if the peace officer in making the

> arrest acts without malice and in the reasonable belief that the person arrested is the one referred to in the warrant.

CA Civil Sec. 43.55. Although the arrests plaintiff complains of were made pursuant to bench warrants regular on their face, plaintiff alleges that "[t]he actions by defendants, and each of them, were *** wilful, malicious and in reckless disregard of plaintiff's health and safety." FAC para 39. Such conclusory allegations of malice, however, do not suffice to defeat the privilege of section 43.55. See Lopez v City of Oxnard , 207 CalApp3d 1, 9 (1989). Accordingly, defendant officers are privileged from plaintiff's claims of false imprisonment and false arrest.

Finally, the court turns to plaintiff's claims against defendants WL Hudson & Sons, Inc and Clifford V. Cretan for violation of his civil rights pursuant to section 1983, false arrest and false imprisonment. The only factual allegations regarding these defendants are that Clifford V. Cretan, an attorney for WL Hudson & Son, plaintiff's judgment creditor, prepared a bench warrant for the Judge Miram's signature, pursuant to which plaintiff was arrested. Plaintiff offers neither authority nor argument for the proposition that such conduct can give rise to liability under any of his theories. Plaintiff's claims against Clifford V. Cretan and WL Hudson & Sons, Inc are DISMISSED,

For the foregoing reasons, defendants' motion to dismiss (Doc 9) is GRANTED.

IT IS SO ORDERED.

VAUGHN R. WALKER
United States District Judge